No. 11,457

United States
Circuit Court of Appeals
For the Ninth Circuit

ALVA ALEKSICH, as Administratrix of the Estate of Jakor Aleksich, deceased,

Appellant,

vs.

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION, a corporation,

Appellee.

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

The complaint, 2 R., is on an insurance policy. The jurisdiction in the District Court arose from diverse citizenship, the plaintiff being a resident and citizen of the State of Montana; the defendant being a corporation organized and existing under the laws of the State of Nebraska. The amount involved is $24,374.91, as claimed in the third paragraph of the complaint. A sketch of the cause of action is:

The plaintiff is the administratrix of the estate of Jakor Aleksich, who died November 25, 1944. The plaintiff was appointed January 14, 1946.

On October 6, 1943, in Silver Bow County, Montana, defendant, for a consideration in money paid to it by Jakor Aleksich, executed a written contract of insurance, and said policy was kept in force by quarterly payments until Jakor Aleksich was totally injured. These facts are admitted in the answer, 21 R. A copy of the policy is annexed to the complaint. The original policy is an exhibit certified to this Court.

It is further alleged that the defendant insured Jakor Aleksich against *all loss of time* commencing while said policy was in force, resulting directly and independently of all other causes from bodily injuries during any term of this policy through purely accidental means. There were no limitations in the said policy contained on indemnity for total loss of time commencing while the policy was in force, and it recited "This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance." That there was endorsed on the said policy when delivered to Jakor Aleksich these words, punctuated as follows:

> "This policy provides benefits for loss of limb, sight or time, by accidental means, or loss of time by sickness as herein provided." 4 R.

Proceeding, it is alleged that on November 25, 1944, the insured, Jakor Aleksich, was severely injured in body in the Anselmo mine in Silver Bow County, Montana,

in the United States of America, while the said policy was in force. That said injuries were so severe as to completely, and for all times thereafter, destroy Jakor Aleksich's ability to put his time, which he would have had but for such injuries, to any valuable use, or to therein earn any money. That Jakor Aleksich survived the said injuries an appreciable length of time, to-wit: More than one hour, and during such hour he owned a cause of action against the defendant for total loss of his time that he would have had, and could have put to valuable work but for such injuries, and during such time of his survival of said injuries he did not commence any action or suit to enforce action of collection of said cause of action. That under the law of Montana, wherein said contract was executed, such cause of action survived to this administratrix, and is now being prosecuted. Also, that no payment has been made.

It is also alleged that he was 56 years, 4 months and 28 days old; that before the total permanent injury, he was of robust health, earning $7.75 per day, services in demand, expectancy of 16½ years; annual earnings, $2,015, and that he could, and would have earned $24,-374.91 had he not lost his time; that notice was given, etc.

In the answer of the defendant, found 21 R., the following admissions seem enough to reduce the contentions to two points of law. Admits that the said policy recited: "This policy includes endorsements and attached papers, if any, and contains the entire contract of insurance."

Admits that there was endorsed on said policy when delivered to Jakor Aleksich, these words: "Beware. Your policy with us is the best insurance you can buy."

Admits that there was endorsed on said policy when delivered, the following words, punctuated as follows: "This policy provides benefits for loss of limb, sight or time, by accidental means, or loss of time by sickness as herein provided."

Answering the allegations of paragraph 7, admits that on or about November 25, 1944, the insured, Jakor Aleksich, was severely injured in body in the Anselmo mine, in Silver Bow County, Montana, in the United States of America, while said policy was in force. Admits that said injuries were so severe as to completely, and for all time thereafter, destroy Jakor Aleksich's ability to put his time, which he would have had but for such injuries, to any valuable use, or to earn any money. Admits that said Jakor Aleksich survived said injuries for an appreciable length of time, to-wit: About one hour * * *. 22 and 23 R.

The notice to the Company of loss is admitted. 25 R.

The action was tried to the court sitting without a jury. The court made Findings of Fact and Conclusions of Law. These are copied into the judgment, and are not elsewhere repeated in the record. The court also rendered an opinion. The opinion is found 30 R. The judgment dismissing the complaint, and for costs, is found 37 R. Notice of appeal, 41 R. Bond on appeal, 42 R. The statement of points on appeal, 44 R.

The statement of points on appeal is verbatim as follows:

STATEMENT OF POINTS ON APPEAL

(a) The law of Montana is not, and the decision of the Montana Supreme Court cited in the findings as binding on the trial court, is not, to the effect that the plaintiff administratrix could not recover for time lost through accidental means by assured, when the cause of the entire loss of future time occurred before death, though part of the time actually lost was to run after death intervened.

(b) No prior adjudication was claimed in the answer; a judgment against a person is not binding against a personal representative though it chance that the representative appointed be the same person.

(c) When a contract is integrated (nor any mistake, fraud, undue influence claimed), the contract means, and must be enforced for its legal meaning. The expectations of either party as to what rights it confers, or what duties it enjoins, must be disappointed if outside of the legal meaning.

(d) The policy here insured Jakor against loss of time caused by accidental means. Under Montana statute it was an open policy, for it was not limited by any subsequent words in the policy.

(e) The complaint is not for loss of time caused by death—death was set out merely as a requisite of the appointment of an administratrix; the complaint is for

loss of time caused in totality before death an hour later. By repeated decisions of Montana construing a statute if an actionable act causing total loss occur, and the owner of the cause of action does not die instantly, the cause of action is complete, a representative may enforce it, and recover for effects which endured, continued after intervening death of owner of the cause of action.

(f) The learned trial Judge failed to distinguish between a cause of action for death existing in an heir (beneficiary here), non-existent at common law, now given by statute (Lord Campbell's Act) and a cause of action for damages for personal injuries, which died with the death of the owner at common law, but now in its entirety enforcible, and may be commenced by a representative because of the Montana statute of survival of all causes of action.

The judgment should be reversed for new trial and to assess the loss of the assured's time through accidental means admitted to have occurred.

SPECIFICATION OF ERRORS

1. The Court erred in ordering and giving judgment for the defendant that plaintiff take nothing.

2. The Court erred in holding that in its opinion that because of the law, as established by the Supreme Court of Montana in the case of Aleksich vs. Mutual Benefit Health and Accident Association, 164 Pac. (2nd), 372, it necessarily follows that the action must be dismissed.

ARGUMENT AND AUTHORITIES

Where in Montana bodily injuries are received totally impairing earning capacity, and the subject lives an appreciable time thereafter, if another is responsible because of negligence, or otherwise, to pay the loss, there are two fields from which liability springs:

1. The loss to the subject himself survived to the personal representative.

2. The other is the familiar Lord Campbell's Act, liability to pay his heirs and dependents for their loss due to his death.

We believe that the failure to observe that there are two distinct fields of liability caused the Court to err in holding that the law had been established by the Supreme Court of Montana in a previous case springing from the field analogous to the liability under Lord Campbell's Act, and would bar the action in the present field.

Our belief that the Court's ruling is untenable is based largely on the fact that having at one time been defeated by a suit brought on the same transaction in one field, and on the merits as to that field, we renewed the litigation in the other field, and such second litigation in the other field was sustained by the Supreme Court of Montana. This certainly in effect held that the previous failure, though on the merits, was not a bar to the second suit; however, if the judgment of the District Court can be sustained on any theory of the contract and findings here, then, of course, the Court of Appeals must affirm.

The argument will be addressed to the proposition that the decision cannot be sustained on any ground.

The insuring clause of the contract is, "Hereby insures Jakor Aleksich (herein called the Insured), of the City of Butte, State of Montana, against loss of limb, sight or time, sustained or commencing while this policy is in force, resulting directly and independently of all other causes, from bodily injuries sustained during any term of this policy, through purely accidental means, and against loss of time beginning while this policy is in force and caused by disease contracted during any term of this policy, respectively, subject, however, to all the provisions and limitations hereinafter contained." 7 R. 20.

It was agreed at the trial, and we shall not argue it, that this policy must be construed by Montana law. Under such law, the provisions "Subject, however, to all of the provisions and limitations hereinafter contained," does not modify the words "Hereby insures against loss of * * * time sustained while this policy is in force, resulting directly and independently of all other causes, from bodily injuries sustained during the term of this policy through accidental means."

The insuring paragraph under controlling Montana decisions must be cut in two. The words, "Subject, however, to all provisions and limitations hereinafter contained," modify only insurance for "by disease contracted." These words have no effect upon liability for accidental injury, *a remote antecedent.*

This is the law written in Montana.

The rule of the "last antecedent" is here well established.

R. M. Cobban Realty Co. v. Chicago, etc. Ry. Co., 58 Mont. 188; 190 Pac. 988;
State v. Continental Brewing Co., 55 Mont. 500; 179 Pac. 296;
State, ex rel. Hinze v. Moody, 71 Mont. 473; 230 Pac. 575.

It is so well established that all lawyers, for many years, in passing on deeds, executory contracts, etc., regard it as stare decisis.

As to loss of time through *accident,* this policy is open or unvalued.

This claim of plaintiff was assailed in the lower court for novelty. Rejection because of novelty cannot be sustained against a plain contract of a class defined in statutes of the state where the contract is made.

"A policy is either open or valued."

Sec. 8115, R. C. M., 1935.

This is a familiar statute of many states. The text books discuss policies as open, valued or mixed. Parties can contract for any contingencies they desire so long as the contract does not offend some law or good public policy.

"The courts, in the absence of an attack upon their validity, may not interfere with such contracts as may be entered into between parties, nor may they make new contracts for them."

Pearce v. Metropolitan Life Ins. Co., 57 Mont. 79; 186 Pac. 687.

A contract of insurance made in Montana is governed by the law of Montana.

> Capital Finance Corporation v. Metropolitan Life Ins. Co., 75 Mont. 460; 243 Pac. 1061.

Just as "brevity is the soul of wit, and tediousness the limbs and outward flourishes thereof," the insuring paragraph is the soul of an insurance policy.

There is much in this policy to warrant a belief in the lay purchaser that something would be paid for accidental death, but because it was not found in the soul of the contract, the Montana Supreme Court rejected our contentions about these outward flourishes.

> Aleksich v. Mutual Benefit Health and Acc., Montana; 164 Pac. (2nd), 372.

This indicated judicial rigor in our courts to hold fast to the doctrine about integrated contracts when the validity is not put in issue.

In such the legal effect prevails, regardless of what either party believed the contract would give or take away. Either side may be disappointed when it comes to an interpretation by a court.

> Restatement of the Law. Contracts p. 311, Subd. B., par. 230. (Sancho Panza to Don Quixote, "My Lord, many who go out for wool come back shorn.")

Courts divide as to enforcing policies of insurance where liability seems to be found outside of the insuring paragraph, and in promises, expressions, representations endorsed on policies, or in captions, etc. (there are such

on the one in exhibit here). The Supreme Court and this Court enforce such promises.

Mutual Life Ins. Co. v. Hurni Packing Co., 263 U. S. 167;

N. Y. Life Ins. Co. v. Hiatt, 140 Fed. (2nd) 763. (Also formerly Montana);

Park Saddle Horse Co. v. Royal Indemnity Co., 81 Mont. 99; 261 Pac. 88.

Has any court ever consciously refused to enforce a liability found in the insuring paragraph? *When by law of the locus,* it is unmodified, unlimited, or open? We think such a decision would be a *novelty* too bizarre to persuade others as a precedent.

The opinion of the learned trial judge erroneously imputes that to the Montana Supreme Court. But a careful reading of the opinion convinces otherwise in Aleksich v. Mutual Benefit, etc. 164 Pac. (2nd) 372. Quoting: "It is apparent that the insuring clause does not insure against death, nor does the insurer thereby agree to pay any indemnity or benefit by reason of the death of the insured. Therein the contingencies insured against are limited to *loss* of limb, sight or *time resulting from accident* or sickness. (Our Italics.)

Because the Montana Court refused recovery for death because it was not in the insuring clause, is not good ground for holding that it foreclosed recovery for "loss of time" due to accident which is in the insuring clause.

This complaint is for loss of time caused *by the injuries.* The answer "Admits that said injuries were so severe as to completely, and for all time thereafter, destroy Jakor

Aleksich's ability to put his time, which he would have had but for such injuries, to any valuable use, or to earn any money." 23 R. 8.

Then follows an admission which puts this case in the first field of liability and on which finding V.—38 R. and supplemental finding VIII.—34 R., are based. "Admits that Jakor Aleksich survived said injuries for an appreciable length of time, to-wit: About one hour."

The policy being open, unvalued, it would seem that the Court would be concerned only to determine what in law "loss of time" means, and if it is found that it means loss of earning capacity, then whether under Montana law, recovery for such may be obtained by an administrator, on a survived cause of action, though death intervened quickly, and such death was also caused by the injuries.

The occurrence of the greater loss to the injured for which the insurer did not agree to pay, does not absolve the insurer from payment of the lesser loss for which the insurer did agree to pay—*in full* measure. Suppose Aleksich had a horse of an expectancy of 16.5 years of robust health, hired on contract for a year at $3 the day. The defendant insures Aleksich against loss of time of the horse resulting from bodily injuries sustained through purely accidental means. The horse is so injured under the causes fixed that his time thereafter is valueless—but about one hour thereafter he also dies of the injuries. Would the recovery be what a jury or judge would find the earning capacity of the horse to be for a reasonable

expectancy, or would the insurer be heard to say, "While the horse was injured, under the condition insured against, so severely that his time thereafter was inevitably valueless—yet he also died in one hour *of the injuries;* we did not insure against death or time loss due also to death—we are not liable at all, or if for anything, only for the one hour's time.

("The years fly swiftly by, Lorena.") I posed this question to the Montana Supreme Court in 1910 under a *special statute* of survival of a cause of action.

> Beeler v. Butte & London Co., 41 Mont. 465; 110 Pac. 528.

It was answered that the *heirs,* who, *under that statute,* could prosecute the *intestate's cause* of action, could recover for loss of future capacity to earn money. "Unquestionably, his right of action included damages * * * and for his diminished and lost earning capacity for the period of his natural expectancy." Beeler died in a few minutes. Verdict, $15,000.

Again I posed the same question in 1912 under our *general statute* of survival of all causes of action in:

> Melzner, Adm. v. Northern Pacific Ry. Co., 46 Mont. 162; 127 Pac. 146.

Haddox, the injured boy, lived an appreciable, but very short time (minute or two). The question was, as to damages, answered by the Montana Supreme Court by quoting from a Pennsylvania case.

"It logically follows that the damages recoverable by her personal representative should be the same as she could have recovered had death not ensued. Included therein are damages for pain and suffering up to the time of her death and diminution of earning power during a period of life which she would probably have lived had the accident not happened." Affirmed for $14,000.

This leading case has been often followed in Montana.

Autio v. Miller, 92 Mont. 150; 11 Pac. (2nd) 1039.

In fact, this Court has followed it.

Swift & Co. v. Daly's Adm'x., 44 Fed. (2nd) 40, (verdict for $5,000.)

Though the point was not there raised because too well settled.

The statute on which these cases are based has not been repealed. (To save space, we ask opposing counsel to answer.)

"Loss of Time" is loss of earning capacity.

The popular and technical legal meaning correspond.

Galveston H. & S. Ry. Co. v. Eubanks (Tex. Civ. App.) 42 S. W. (2nd) 475.

"The rule is well settled that in the case of a professional man, the proper measure of damages for loss of time is the amount he would have earned by the practice of his profession."

Burlington Transp. Co. v. Josephson, 153 Fed. 2nd, 372. Citing text book.

There is no doubt but that insurance against loss of time means insurance against any and all loss of time. If there were doubt it is resolved by the Supreme Court in

Mutual Life Ins. Co. v. Hurni Packing Co., 263 U. S. 167, and

"If the Company, by the use of the expression in the policy, leaves it a matter of doubt as to the true construction to be given the language, the Court should lean against the construction that would limit the liability."

London Assurance Co. v. Companhia, etc., 167 U. S. 149, p. 159;

John Hessler, Adm. v. Federal Casualty Co. (Ind.) 129 N. E. 325;

American Liability Co. v. Bowman, 114 N. E. 992;
Canton Ins. Office, Ltd. v. Woodside, et ux. (CCA 9th) 90 Fed. 301.

The rule of the last antecedent is not confined to Montana.

Vickers v. Electozone C. Co. (N. J.), 52 Atl. 467 wherein is cited Parsons on Contracts, Clark on Contracts, Story on Contracts.

Passing from argument on what we submit is an absolute liability flowing from the insuring clause, there are other features of this document confirming our view and on which the courts now base liability, and the same measure of liability as springs from the soul of the policy in exhibit.

The tradition is unfounded "that punctuation is no part of a contract."

Tidal Oil Co. v. Roelfs (Okla.), 187 Pac. 486;
Joy v. St. Louis, etc., 138 U. S. at p. 31.

Looking at the caption in bold type (punctuated as we now do) "This policy provides benefits for loss of limb, sight or time, by accidental means, or loss of time by sickness as herein provided." Regardless of the rule of the last antecedent, without any comma after "sickness" "as herein provided" grammatically does not modify "loss of time by accidental means."

Above these words in larger type appear:

PERFECT INCOME POLICY.

Now the perfect income policy for this working man would insure him and his estate against loss of time, i. e., earning capacity, due to accidental means. This Court has said that it is not enough to point the admonitory finger at such as, for gain, thus snare the unwary.

Insurance is now of Interstate Commerce. They say this is a "Standard Policy." If so, the snare is set in every state.

Omit the words "Perfect Income Policy," the same snare is set (for cultured men who know grammar and correct punctuation), as an endorsement on the back of the policy.

The answer admits that there was a rider pasted on the policy when it was delivered, as follows:

"BEWARE,

Your policy with us is the best insurance you can buy."

This Court knows that for a century there could and can be bought by any man, without medical examination, and regardless of occupation, an annuity for life equal to the earning power here.

Well did Mr. Justice Brandeis say in an essay 30 years ago, "The life insurance reserves are a menace to American Economy."

The Montana Supreme Court has not spoken on the phases of liability presented here.

There is no prior adjudication pled in the answer.

A final judgment in one of the fields from which liability in this state springs, has no bearing under our law as to liability in the other field. We speak with the assurance of having made a laboratory experiment.

The writer prosecuted and lost on the merits, the case of Haddox v. Northern Pacific Ry. Co., 43 Mont. 8; 113 Pac. 119.

We then, after the appointment of an administrator, brought suit on the same transaction in the other field, and recovered on the merits, a final judgment for $14,000 in the Supreme Court of Montana.

Melzner as administrator v. Northern Pacific Ry. Co., 46 Mont. 167; 127 Pac. 146.

In the Court's opinion in the prior suit on this policy for the beneficiary for death of the insured (in one field), there is no language denying liability in the other field.

No argument or citation of authority was made to the Court concerning liability arising in the other field. If

the Court had expressed itself about such liability, it could not shine above the twilight of obiter dictum.

> "An obiter dictum is a gratuitous opinion, an individual impertinence which, whether it be wise or foolish, right or wrong, bindeth none—not even the lips that utter it."

This was said of its own obiter dictum.

> Empire Theater Co. v. Cloke, 53 Mont. 183 at p. 191; 163 Pac. 107;
>
> U. S. ex rel. Johnston v. Clark County, 96 U. S. 211.
>
> Milando v. Perrone, C. C. A. 2nd; 157 Fed. 2nd 1002.

The Montana Court does say:

> "We are convinced that the intention of the parties to the contract was that the only indemnity contemplated was for loss of limb, sight *or time,* and that such is the meaning of the contract as therein expressed." (Italics ours.)

The administratrix is now suing for Jakor Aleksich's loss of time due to the accident and the total permanent injuries sustained thereby—his death is basis of her appointment—not the basis of the liability.

Again the Court says:

> "It is thus apparent that even though the policy should be considered broad enough to include indemnity for loss of time resulting from death, the only possible cause of action, under the circumstances, would be in favor of the estate of the insured."

The opinion speaks several times of loss of time due to death. It nowhere asserts absence of liability to indemnity for loss of time caused by accidental injuries.

> "The doctrine of res judicata is not available as a bar to a subsequent action if the judgment in the former action was rendered because of a misconception of the remedy available, or of the proper form of proceeding. In such situation, the plaintiff is entitled to bring the proper proceeding to enforce his cause of action."
>
> 30 Am. Jur. 210.

> "The general rule is that a judgment rendered because of defect of parties, does not operate to bar a subsequent action. This rule prevails whether the judgment is based upon a want of parties, a misjoinder of parties, a temporary disability of the plaintiff to sue, or a mistake of the plaintiff as to the character or capacity in which he brings suit."
>
> 30 Am. Jur. 211.

Being less bashful than the farm boy at the carnival, I freely confess that in suing for the beneficiary for death benefits, I did not guess correctly which shell the pea was under. But I was lured on by earnest, cunning words of the "confidence man." So artful that one of the ablest Judges ever on our Supreme Bench, Judge Angstman, still believes that there was a pea under that shell.

The policy recited:

> "This policy does not cover death * * * sustained in any part of the world except the United States and Canada."

"In event of accidental death, immediate notice thereof must be given to the Association."

"The Association shall have the right and opportunity * * * to make an autopsy in case of death where it is not forbidden by law."

"Indemnity for loss of life of the insured is payable to the beneficiary if surviving the insured, otherwise to the estate of the insured. All other indemnities of this policy are payable to the insured."

And then what was perhaps the acme of deceit to the insured, as recited in the application, he was put through a pantomime; he was asked to name and give address of his beneficiary—to which he answered: "Alva Aleksich, Murray Hospital."

In the deathless classic, "The Vicar of Wakefield," the Lord of the Manor, a heartless rake, thought he was deceiving the vicar's innocent daughter by a mock marriage. In the charming climax, it turned out that the celebrant of the ceremony (though woefully fallen from grace), was an actually licensed Priest, and my Lord was married to the young lady.

There is no claim of mistake of the defendant in uttering this policy, or of deceit or undue influence on the part of the insured in buying an article moving in interstate commerce. The legal tenor of the contract does call for more than the Company expected to pay, but for much that it pretended to assure, it intended to pay nothing.

Men who formulate with careful study, contracts so cunningly worded as to deceive a learned judge, and use them as bait to entrap, deserve no sympathy when the

actual legal interpretation of their contracts is found to require a payment of more than the Courts would have required if all parts of these contracts had been fair and honorable.

We submit that the judgment should be reversed with direction to assess the value of the insured's time lost because of the accidental injury, according to the established law of Montana, i. e., his earning power for his expectancy, having regard that in manual labor, the ability to work decreases with age, and give judgment accordingly.

Respectfully submitted,

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